

SUPREME COURT OF QUEENSLAND

CITATION: *Stephens & Anor v Chee* [2015] QSC 138

PARTIES: **DAVID CHARLES STEPHENS**
(first applicant)
STUART CHARLES LESLIE BENJAMIN
(second applicant)
v
TIMOTHY HOCK LING CHEE
(respondent)

FILE NO/S: SC No 11140 of 2014

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 22 May 2015

DELIVERED AT: Brisbane

HEARING DATE: 5 March 2015; 6 March 2015

JUDGE: Philip McMurdo J

ORDER:

- 1. The applicant trustees are advised that proceedings can and ought to be brought against Acebeck Pty Ltd, THLC Pty Ltd and Mexibrook Pty Ltd for repayment of moneys owing by them to the Chee Family Trust, according to the accounts of that trust.**
- 2. The applicant trustees are directed to seek the further advice of the court on those proceedings after the completion of disclosure if the proceedings are not determined earlier.**
- 3. The originating application is otherwise dismissed.**
- 4. The copies of the Report and counsel's opinion and the draft statement of claim will be placed within sealed envelopes and marked "Not to be opened without the leave of the court or a judge".**

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – APPLICATIONS TO COURT FOR ADVICE AND AUTHORITY – PETITION OR SUMMONS FOR ADVICE – WHAT QUESTIONS MAY BE ANSWERED – a so called *Beddoe* application by trustees under s 96 of the *Trusts Act 1973* (Qld) seeking advice from the court as to whether to bring proceedings and also for orders that would indemnify them from the assets of the trust

for the costs of that proceeding – whether the court should make a distinct order indemnifying the trustees from the trust assets – where it would be unnecessary to make a distinct order that the trustees be indemnified out of the trust fund in the event that the court advised the trustees to bring proceedings because, where trustees obtain the approval of the court they will be entitled to costs of the proceeding out of the trust fund – where the respondent was also a beneficiary of the trust and previously sole director of the corporate trustee – where the proposed claims by the trustees would largely be against the respondent, based upon his conduct of trust affairs as director of the corporate trustee – where the trustees also sought an order that they should not provide certain documents of the trust to the respondent beneficiary who would be the principal defendant in their proposed litigation – where the trustees were not advised to commence proceedings against the respondent but were advised that proceedings could and should be brought against certain entities named in the originating application – where the application was otherwise dismissed

EQUITY – TRUSTS AND TRUSTEES – APPLICATIONS TO COURT FOR ADVICE AND AUTHORITY – PETITION OR SUMMONS FOR ADVICE – PARTICULAR CASES – where the provision of the court’s advice to the trustees that they ought to bring proceedings would have the practical effect that the costs of litigation would come from the trust fund – where the respondent was also a beneficiary of the trust and previously sole director of the corporate trustee – where the proposed claims by the trustees would largely be against the respondent, based upon his conduct of trust affairs as director of the corporate trustee – whether the dispute was in essence one between the beneficiaries – whether the trustees should remain neutral and should not litigate for the benefit of one group against the other – whether costs should come from the trust assets where the proposed defendant is a beneficiary with a substantial interest in the trust assets – where it was preferable for the cost burden to fall upon the parties which stood to gain from the litigation – where the trustees were advised that proceedings could and should be brought against certain entities named in the originating application – where the application was otherwise dismissed

Trusts Act 1973 (Qld), s 96, s 63(1)

Alsop Wilkinson v Neary [1996] 1 WLR 1220, considered

El Sayed v El Hawach [2015] NSWCA 26, cited

Evans v Evans [1986] 1 WLR 101, cited

Lewis v Condon (2013) 85 NSWLR 99; [2013] NSWCA 204, cited

Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian

Orthodox Diocese of Australia and New Zealand (2008) 237 CLR 66; [2008] HCA 42, distinguished
Norman v Federal Commissioner of Taxation (1963) 109 CLR 9, cited
Re Application of Macedonian Orthodox Community Church St Petka Inc (No 4) [2007] NSWSC 254, considered
Re Application of Macedonian Orthodox Community Church Re Beddoe [1893] 1 Ch 547, cited
Re Dallaway Deceased [1982] 1 WLR 756, cited
Roberts v Gill & Co [2011] 1 AC 240, cited
Salmi v Sinivuori [2008] QSC 321, distinguished
St Petka Inc (No 3) [2006] NSWSC 1247, considered

COUNSEL: M P Amerena for the applicants
R I M Lilley QC, with D J Morgan for the respondent

SOLICITORS: Broadley Rees Hogan for the applicants
Synkronos Legal for the respondent

- [1] This is an application by trustees seeking advice from the court as to whether to bring proceedings and for a particular order that would indemnify them from the assets of the trust for the costs which they might incur or be ordered to pay in that proceeding. They also apply for an order that they should not provide certain documents of the trust to one of the beneficiaries, Timothy Chee, who would be the principal defendant in their proposed litigation.

The trust

- [2] This trust, called the Chee Family Trust, was settled in 1972. The original trustees, now in their late 80s, are the parents of the four beneficiaries who are Timothy Chee, Kay Ling Chee, Elizabeth Sun Ling White and Lois Lau.
- [3] The trust deed provides that until the death of the last survivor of Mr and Mrs Chee, the income of the trust fund would be held upon trust:

“to pay divide or apply the whole income of the trust fund to or between or for the maintenance support to (sic) benefit of all or any one or more of ... “the beneficiaries” ... in such proportion and in such manner as the trustees shall in their absolute discretion determine ...”¹

It further provides that at the discretion of the trustees, at any time before the death of the last survivor of Mr and Mrs Chee, the whole or any part of the capital of the trust fund might be paid or applied to or for the benefit of any one or more of the beneficiaries or be held upon such trust for the benefit of the beneficiaries or any of them as the trustees shall determine.²

¹ Cl 1(i).

² The proviso to cl 1(i).

- [4] Upon the death of the last survivor of Mr and Mrs Chee, the undistributed income and the capital of the trust fund is to be paid to the surviving beneficiaries in equal shares.³
- [5] The power to appoint new trustees or an additional trustee is vested in the existing trustees for the time being or the Governing Director for the time being of the company called Chee Investments Pty Ltd.⁴
- [6] Mr and Mrs Chee were the trustees until 1996 when they were replaced by CBC Properties (Qld) Pty Ltd (“the corporate trustee”). Its directors were then Mr and Mrs Chee and Timothy Chee and Mr J M Chee (who ceased acting in 1999). Timothy Chee became the sole director in March 2004.
- [7] On 23 January 2014, the shareholders of the corporate trustee (Mr and Mrs Chee) removed him as its director and secretary and they again became the directors.
- [8] On 6 June 2014, Mr Chee (senior) resigned as a director and was replaced by Elizabeth Sun Ling White and her husband, Peter White. A week later, the applicant Mr Benjamin, an accountant in private practice, was appointed an additional trustee.
- [9] On 25 June 2014, solicitors acting for the corporate trustee engaged Mr Benjamin to undertake an investigation of the affairs of the trust. He provided a lengthy report dated 10 September 2014, which I will call the Report.
- [10] The trustees’ solicitors then sought counsel’s advice about the contents of the Report. Counsel advised that if so approved by the court, proceedings should be commenced by the trustees against Timothy Chee, certain companies associated with him and the corporate trustee itself.

The application

- [11] This originating application, filed on behalf of the corporate trustee and Mr Benjamin, was returnable in the Applications List on 1 December 2014. There was then another application which was filed on behalf of Kay Ling Chee,⁵ seeking an order for the removal of the trustees. The two applications were adjourned for hearing on 5 and 6 March 2015. In the present application, there was a consent order for the provision of the Report to a solicitor acting for Timothy Chee, upon his undertaking to keep it confidential and to disclose its contents only to counsel and Timothy Chee’s “accounting professional advisors who have a bona fide need to know all or some of the contents of the Report ...”.⁶ It was further ordered that the applicants provide to Timothy Chee a “short statement of the allegations and short particulars thereof intended to be made against [him and his companies]”. Timothy Chee was named as the respondent to this application. Notice of it was also given to the other beneficiaries.
- [12] By an order of 27 January 2015, there were further directions for the conduct of these two applications and for a mediation between the trustees and Timothy Chee at which the other beneficiaries were permitted but not obliged to attend. Nothing was resolved at the mediation.

³ Cl 1(ii).

⁴ Cl 1(viii)(c).

⁵ SC No 11055 of 2014.

⁶ The order provides for the delivery of the Report by “the Respondents”, an obvious error.

- [13] At the commencement of the present hearing, counsel for Kay Ling Chee said that she did not wish to prosecute her application because of the way in which things had developed. Her principal complaint against the trustees had been that they were not doing anything, or enough, to pursue Timothy Chee for some of the claims which are the subject of the trustees' proposed litigation against him. As it had become clearer that the trustees' case was to be pursued (subject to the advice of the court), Kay Ling Chee did not wish to press for the removal of the trustees. Important also was the fact that shortly before the present hearing, the corporate trustee had been replaced by Mr D C Stephens, another member of Mr Benjamin's firm. This removed the difficulty from the proposed suit by the trustees being one to be brought both by and against (amongst others) the corporate trustee. Mr Stephens was substituted for the corporate trustee as an applicant in this proceeding.
- [14] Upon hearing that Kay Ling Chee's application was not being pursued, counsel for Timothy Chee made an oral application for the removal of Mr Benjamin and Mr Stephens, upon the basis that they were not in all respects independent because, it was said, Mr Benjamin was aligned with the other beneficiaries and Mr Stephens was simply following Mr Benjamin. Counsel for the trustees objected to that application being considered without his clients having a proper opportunity to prepare a response to it. I accepted that submission. An application for the removal of the trustees should be made upon proper notice to the trustees. Although Kay Ling Chee's application for the removal of trustees was before the court on 5 March, it was brought on different grounds. But this challenge to the independence of the present trustees is of some relevance to their application for advice and for consequential orders.
- [15] The application for the court's advice is brought under s 96 of the *Trusts Act 1973* (Qld). Section 96 is as follows:

“96 Right of trustee to apply to court for directions

- (1) Any trustee may apply upon a written statement of facts to the court for directions concerning any property subject to a trust, or respecting the management or administration of that property, or respecting the exercise of any power or discretion vested in the trustee.
- (2) Every application made under this section shall be served upon, and the hearing thereof may be attended by, all persons interested in the application or such of them as the court thinks expedient.”

The written statement of facts in this application is said to be constituted by the entirety of the Report.

- [16] This is a so-called *Beddoe* application,⁷ seeking a direction from the court that the applicants as the present trustees can and ought to commence proceedings in conformity with the written opinion of counsel to which I have referred. According to the usual practice, I was provided with a copy of that opinion which was not provided to any of the beneficiaries. I was also provided, on the same basis, with a draft of a statement of claim, albeit not a complete draft. I received some of the trustees' submissions in the absence of Timothy Chee and his lawyers.

⁷ From *Re Beddoe* [1893] 1 Ch 547.

- [17] If trustees obtain the approval of the court to bring proceedings in this context “then, provided they have made sufficient disclosure to the court and follow any directions which it gives, they will be entitled to their costs out of the trust fund, win or lose, together with any costs they may be ordered to pay to the third party”.⁸ The principles to be applied in this context are as stated in the judgment of the plurality in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand & Anor*.⁹

Should the trustees be suing at all?

- [18] With one exception, the proposed claims by the trustees would be against Timothy Chee and based upon his conduct of the affairs of the trust by his directorship of the corporate trustee. The corporate trustee is a proposed defendant, but it is unlikely to have any assets.
- [19] The exception is that part of the proposed litigation in which the trustees will seek to recover moneys paid by the corporate trustee to entities associated with Timothy Chee and which were recorded in the accounts of the trust as loans made to them. If they were loans (which is discussed below), they were made on an interest free and unsecured basis. The trustees propose to seek the repayment of those moneys from the associated entities upon a number of legal bases. As I will discuss, the entities, although associated with Timothy Chee, are not wholly owned by him. I will call these proposed claims the loan repayment claims.¹⁰
- [20] For Timothy Chee it is argued that each of the other proposed claims should not be the subject of the court’s advice because they are claims which could and should be brought, not by the trustees, but by the other beneficiaries. In special circumstances, a discretionary object, as well as a beneficiary of a fixed trust, may bring a derivative action for the benefit of the trust estate: *El Sayed v El Hawach*;¹¹ *Lewis v Condon*.¹² The question of whether the circumstances of this trust are “sufficiently special to make it just for the beneficiary to have the remedy (of the derivative action)”¹³ was not developed in the arguments. I accept that the trustees do not wish to commence and prosecute this litigation without the orders which they now seek, because of a concern that they might have to pay their own costs and those of the proposed defendants. It is not clear whether the trustees would be unwilling to pursue these claims if they had the security of an agreed indemnity by the other beneficiaries. The argument for Timothy Chee is that there should be no risk of the costs of the proposed litigation being borne by the trust fund.
- [21] That is relevant to the question of whether advice should be given to the trustees under the present application, because of the impact of such advice on a trustee’s right to indemnity from the trust assets. A trustee who properly incurs costs and expenses in the prosecution or defence of litigation will be entitled to an indemnity from the trust fund

⁸ David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton: Law of Trusts and Trustees* (LexisNexis, 18th ed, 2010) [85.48].

⁹ (2008) 237 CLR 66; [2008] HCA 42 (*‘Macedonian Church’*).

¹⁰ Counsel for Timothy Chee conceded that the loan repayment claims could be brought against the alleged borrowers, because they were in the relevant sense claims against persons external to the trust, but submitted that the claims lacked legal merit.

¹¹ [2015] NSWCA 26.

¹² (2013) 85 NSWLR 99; [2013] NSWCA 204.

¹³ *Roberts v Gill & Co* [2011] 1 AC 240, 256 [46].

and “obtaining judicial advice resolves doubt about whether it is proper for a trustee to incur the costs and expenses of prosecuting or defending litigation”.¹⁴

- [22] Therefore, the provision of the court’s advice to the trustees that they ought to bring and prosecute these claims would have the practical effect that their costs and those of the defendants, if they were ordered to pay them, would come from the trust fund. In that event, the trustees would not need the further order which is sought by the originating application as follows:

“1.(b) subject to any other order made by the Court, the applicants as the present trustees are entitled to be indemnified out of the assets of the Chee Family Trust for:-

- (i) their own costs on an indemnity basis of and incidental to instituting, litigating and further and alternatively, mediating or compromising the foreshadowed proceedings prior to, at first instance and on any appeal; and
- (ii) any costs that they may be ordered to pay another party in the foreshadowed proceeding and upon any appeal.”

- [23] At times, the arguments seemed to suggest that there were two questions: whether the trustees should be advised to sue and whether they should be indemnified as to costs. But if the trustees were advised to sue, the second question would have been answered and an order in terms of para 1(b) would be unnecessary.

- [24] In *Macedonian Church*, the judge at first instance, Palmer J, both advised that a certain proceeding should be defended and made a specific order that the trustee was entitled to pay its reasonable costs of defending the proceeding from certain trust assets.¹⁵ The New South Wales Court of Appeal allowed an appeal from those orders, but its decision was reversed in the High Court. The particular circumstances in which that further order as to costs was made need to be understood. The relevant proceeding had been brought by the Diocesan Bishop of the Macedonian Orthodox Dioceses of Australia and New Zealand against the incorporated Association which was the appellant in the High Court. The Bishop had claimed, amongst other things, that property held by the Association was held upon trust for the Macedonian Orthodox Church and was subject to the Bishop’s control. The existence of any trust, or at least the trust alleged by the Bishop, was denied by the Association. Another judge had determined, as a separate question, that some of that property was held by the Association on a trust, but what was still to be determined was whether it was held upon the trust for which the Bishop contended. Under the New South Wales equivalent of s 96,¹⁶ the Association sought the advice of the court as to whether it would be justified in defending that claim by using that property (or some of it) for the payment of its costs. But if the Association failed in its defence of the Bishop’s claim, all of the relevant property would be held for the Bishop. That circumstance required more than the court’s advice in order that the Association might incur costs in defending the claim without an apprehension of having to pay them from another source. It therefore needed such a further order about its costs.

¹⁴ *Macedonian Church* (2008) 237 CLR 66, 94 [71].

¹⁵ *Re Application of Macedonian Orthodox Community Church St Petka Inc (No 4)* [2007] NSWSC 254; *Re Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247.

¹⁶ *Trustee Act 1925* (NSW) s 63(1).

- [25] Some of the authorities discussed by Palmer J had that same circumstance,¹⁷ namely *Re Dallaway Deceased*;¹⁸ *Evans v Evans*¹⁹ and *Alsop Wilkinson (a firm) v Neary*.²⁰ Another example is the judgment of this court in *Salmi v Sinivuori*.²¹
- [26] That circumstance does not exist in the present case. If the trustees litigated these claims but unsuccessfully, there would still be an ample trust fund from which they could be indemnified. They have no requirement of a distinct order as they seek in para 1(b). Nevertheless, the reasoning of Palmer J and in the other cases which I have mentioned is relevant for the consideration of the *Beddoe* application. The reason is that although the proposed adversary here (Timothy Chee) could not claim to be entitled to all of the property held by the trustees from which they could seek to be indemnified for the costs of the litigation, still he, as a beneficiary, has an interest in that property. If the claims against him were unsuccessful, nevertheless some of the property which could be applied for his benefit or which would vest in him upon the vesting date of this trust, would be instead applied for the trustees' costs. It is the potential unfairness of that outcome which is a basis for his argument that the proposed litigation should not be funded from trust assets. More generally, it is submitted that where the dispute is in essence one between the beneficiaries, the trustees should remain neutral and should not litigate for the benefit of one group against the other. Therefore, it is argued, the trustees here should not be advised about their proposed claims because the costs and expenses of that litigation could not be properly incurred by them as costs and expenses of the trust.
- [27] In *Macedonian Church*, the trust was a charitable trust and so did not have the circumstance of a conflict between beneficiaries who are able to fund their own litigation. In the High Court, the plurality distinguished that case from a kind which Timothy Chee suggests exists here:
- “Where there is a non-charitable private trust involving a conflict between beneficiaries, or between beneficiaries alleging a breach of trust out of which a trustee has profited and that trustee, and where the defendants in those proceedings have a personal capacity to fund the defence, it might not be correct to give the trustee an opinion, advice or direction.”²²
- Similarly, in that case Palmer J said that where the proposed litigation involved, in substance, adversaries who were beneficiaries and able to fund their own proceedings, it may be “more practical, and fairer, to leave the competing claimants to the beneficial interest in the trust estate to fight the litigation out amongst themselves, at their own risk as to costs and leave the trustee as a necessary but inactive party in the proceedings”.²³
- [28] In *Alsop Wilkinson (a firm) v Neary*, Lightman J classified litigation involving trustees by reference to three types of cases. The first, which he described as a “trust dispute” involves a dispute as to the trusts on which the relevant property was held. The second,

¹⁷ *Re Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247.

¹⁸ [1982] 1 WLR 756.

¹⁹ [1985] 1 WLR 101.

²⁰ [1996] 1 WLR 1220.

²¹ [2008] QSC 321.

²² (2008) 237 CLR 66, 92 [67].

²³ *Re Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 [62] in a passage cited with approval by the plurality in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand and Anor* (2008) 237 CLR 66, 96 [84].

which he described as a “beneficiaries dispute”, is a dispute with one or more of the beneficiaries as to the propriety of any act or omission by the trustees. The third, which he described as a “third party dispute”, is a dispute with persons, other than in the capacity of beneficiaries, in respect of rights and liabilities assumed by the trustees as such in the course of administration of the trust. In that third category, Lightman J said, trustees are entitled to an indemnity against all costs, expenses and liabilities properly incurred in administering the trust. But as to the second category, he said “[a] beneficiaries dispute is regarded as ordinary hostile litigation in which costs follow the event and do not come out of the trust estate”. Cases in the first category, he said, may be either “friendly” or “hostile” litigation and in the latter kind of case, “ordinarily the trustees will not be entitled to any indemnity, for they have incurred expenditure and liabilities in an unsuccessful effort to prefer one class of beneficiaries ... over another ... and so have acted unreasonably and otherwise than for the benefit of the trust estate ...”.²⁴

- [29] In the present case, the arguments sought to position the proposed claims by reference to that threefold classification. The classification, with respect, is useful but not of itself determinative. The exercise of the broad discretion under s 96 should not be so confined.
- [30] In the *Macedonian Church* case, the plurality said that a trustee’s application for judicial advice about whether to sue is directed not only to the personal protection of the trustee but the “no less important purpose of protecting the interests of the trust”.²⁵ The interests of the trust are protected by the prosecution of apparently meritorious claims to recover property or funds for the trust. The proposed claims against Timothy Chee are against him not as a beneficiary but as the controlling mind of the former trustee which is said to have acted in breach of its duties.
- [31] The trustees’ submission was that the present case was as described in *Lewin on Trusts* as follows:²⁶

“... Somewhat analogous to third party proceedings and it is thought that the claim and trustees will be entitled to their costs, so far as not recovered from the defendant trustees, only if they have acted reasonably in bringing the action. Unless the informed consent of all beneficiaries, or a suitable indemnity from the beneficiaries, is available, the prudent course is for the proposed claim and trustees to make a *Beddoe* application for directions as to whether they should sue, for the issue in the *Beddoe* application being whether it is in the interest of the Trust fund for the Trust money to be spent on pursuing the proposed defendants.”

But that passage does not deal with a case such as the present where the critical circumstance is that the proposed defendant is also a beneficiary.

- [32] Nevertheless, the prosecution of these claims with an indemnity in favour of the trustees from the trust assets has a potential unfairness to Timothy Chee. If the proposed claims succeed, it will be Timothy Chee’s sisters who will ultimately enjoy the fruits of the action, and without their having to fund the litigation or having a direct exposure to an order for costs. On the other hand, should the proposed litigation be unsuccessful, there

²⁴ *Alsop Wilkinson (a firm) v Neary* [1996] 1 WLR 1220, 1225E-F.

²⁵ (2008) 237 CLR 66, 94 [72].

²⁶ Lynton Tucker, Nicholas Le Poidevin and James Brightwell (eds), *Lewin on Trusts* (Sweet & Maxwell, 19th ed, 2014) [27-187].

will be an ultimate detriment to Timothy Chee from the diminution in the assets of the trust in indemnifying the trustees, a detriment which is as great as that to the other beneficiaries. The potential unfairness exists although Timothy Chee would not be sued as a beneficiary. This unfairness could be avoided by the claims being prosecuted either by the other beneficiaries or by the trustees but with an indemnity from the other beneficiaries rather than from the trust fund.

- [33] On any view, the proposed litigation will be expensive. On the estimate of the trustees' solicitor, my impression is that their costs and outlays would be about \$500,000. Mr Chee's lawyers say that the figure would be higher. It may be noted that Mr Benjamin has charged more than \$70,000 for the preparation of the Report. The proposed claims would involve very substantial factual inquiries in respect of transactions and events covering some decades. The documentary evidence and its disclosure would be considerable. The case would be likely to take some weeks of trial. Therefore, it is not unrealistic to suppose that the potential impact upon the trust assets of the trustees litigating these claims with the right of indemnity against the assets would be of the order of \$1 million.
- [34] The costs of the litigation may not be disproportionately high compared with the amounts which would be sought from the defendants. But the present question is whether the costs should come from the trust assets, in which Timothy Chee has a substantial interest, regardless of the outcome of the litigation. In my view, it would be preferable for the cost burden to fall upon the parties who stand to gain from the litigation.
- [35] Further, the essential neutrality of the trustees could be compromised by the trustees being active participants in this litigation even if indemnified by the other beneficiaries rather than from the trust fund. It must be remembered that the trustees have a discretion in relation to the distribution of the income of the fund.
- [36] It unclear whether the other beneficiaries would be prepared to bring these proceedings at their own cost, rather than leaving it to the trustees to do so at the cost of the trust fund. If the trustees had wished to argue that the only practicable means for the pursuit of these claims was by the trustees prosecuting them, it was incumbent upon the trustees to lead evidence to that effect. It may be noted in this respect that the net assets of the trust as at 30 June 2013, exceeded \$4 million and that each of the beneficiaries has received substantial distributions of income over many years.

Claims against the related entities

- [37] These are the parties named in para 1(a)(iii) to (x) of the originating application, save that the trustees have since decided not to seek approval to sue one of them, Gorlicks Homes Pty Ltd. According to the accounts of the trust which were prepared at the direction of Timothy Chee, as at 30 June 2013 there were loans in various amounts to these entities totalling \$3,678,330.²⁷ The relevant ledgers recorded some changes to those amounts so that the balance owing as at 31 December 2013 totalled about \$4.4 million. Each loan was apparently made on an unsecured and interest free basis. There are no loan documents which have been found. Each loan was recorded in the accounts of the trust as a current asset, indicating that it was payable or could be made payable within the next accounting period.

²⁷ Deleting \$30,190 shown as owing to Gorlicks Homes Pty Ltd.

- [38] The proposed claims against these parties are of two kinds. The first is to have these loans repaid (the loan repayment claims). The second is to recover further sums from these parties upon an equitable basis. In essence, the proposed case is that the loans were made to them by the corporate trustee, under the control of Timothy Chee, in breach of the trustee's duty and in order to advantage the borrower and to the disadvantage of the trust. In turn, Timothy Chee was said to have been the controlling mind or a controlling mind of each of these entities, so that it was aware that it had obtained the benefit of its interest free loan by a breach of trust. The trustees propose to claim relief such as equitable compensation for the loss of the use of the moneys.
- [39] I heard submissions from Timothy Chee as to merits of these proposed claims. The only submission advanced against the merits of the loan repayment claims was that, in truth, the payments to these entities were not loans to them but were payments or advances to Timothy Chee himself under the proviso to cl 1(i) of the trust deed. That argument was also put by reference to s 63(1) of the *Trusts Act* which provides as follows:
- “(1) Where a power to pay or apply any property for the maintenance, education, advancement, or benefit of any person, or for any 1 or more of those purposes, is vested in a trustee, the trustee when exercising the power shall have authority to impose on the person any condition, whether as to repayment, payment of interest, giving security, or otherwise; and at any time after imposing any such condition, the trustee may, either wholly or in part, waive the condition or release any obligation undertaken or any security given by reason of the condition.”
- [40] It was argued that these were payments for the benefit of Timothy Chee because of the suggested capacities in which the payees received the funds. But that defence would be inconsistent with the characterisation of the payments as loans to the entities, according to the accounts which were prepared for the trust under the supervision of Timothy Chee over many years. And as for the recipients being trustees, in no case does it appear that the trust was a fixed trust under which Timothy Chee was the only beneficiary. The trustees have not found any record that any of these payments was a distribution of income or a payment for Timothy Chee's personal benefit. So the accounts of the trust showing these loan balances are not contradicted by other trust records.
- [41] Of the seven entities against which the loan repayment claims would be made, four of them are recorded as owing relevantly small amounts, in no case exceeding \$3,000. The amounts in their cases do not warrant litigation. That leaves for consideration the proposed claims against Acebeck Pty Ltd, the TFC Trust and Mexibrook Pty Ltd.
- [42] Although this judgment is to be advisory and not adjudicative, some observations must be made as to these potential claims. The largest of them would be against Acebeck Pty Ltd, which is recorded as owing at 31 December 2013 an amount of \$2,277,071. This company was incorporated in 1990. From then until December 2003, Mr and Mrs Chee senior were its directors and its only shareholders. Timothy Chee became a director in July 1999 and is apparently now the only director. Acebeck is the trustee of the so-called Acebeck Investment Trust. Exhibited to the affidavit of Mr Tahir, an accountant for Timothy Chee, is a copy of the trust deed of the Acebeck Investment Trust dated 1 April 1990. It is a discretionary trust. The appointors under that trust are Mr and Mrs Chee (senior) and the specified beneficiaries are them and their four children.

- [43] According to the (draft) accounts of the subject trust, Acebeck owed \$2,273,354 as at 30 June 2013. The balance owing at the end of each of the previous years is set out in the Report and in the trust's financial statements which are exhibited to an affidavit of Mr Benjamin.²⁸ The earliest of these financial statements is for the year ended 30 June 2003. The Balance Sheet as at 30 June 2013 does not specify the balance of this debt but the Balance Sheet as at 30 June 2014 shows the individual debtors at the previous balance date. As at that date, the accounts record an amount of \$3,683,972 as owing by Acebeck. The Report also indicates that over the period of 10 years for which the trustees have relevant accounts and records, more cash was paid by Acebeck to the subject trust than Acebeck received from it. This suggests that over the years in which Timothy Chee controlled both the corporate trustee and Acebeck, the debt owing by Acebeck to the subject trust markedly *decreased*. In the Report, Mr Benjamin comments that the Acebeck loan existed prior to 2003. In other words, most of this loan predated Timothy Chee's control of the affairs of the subject trust.
- [44] All of this indicates some of the potential difficulty in a claim against Acebeck of the second kind, i.e. that it was in receipt of property of the subject trust which was paid to it in breach of trust.
- [45] According to Mr Tahir's affidavit, the trustee of the TFC Trust since August 2006 has been THLC Pty Ltd. From 1996 to August 2006, the trustee of the TFC Trust was TFC Investments Pty Ltd. The financial statements identify the debtor as "TFC Trust". It appears therefore that the correct debtor is THLC Pty Ltd. The TFC Trust is a family discretionary trust for the family of Timothy Chee. According to the (draft) accounts of the subject trust for the year to 30 June 2013, it then owed the subject trust \$691,128.
- [46] But of that balance owing, nearly all is attributable to amounts which were added by journal entries on 30 June 2009, by which there were purported transfers totalling \$673,232 to the debt recorded as owing by the TFC Trust from what had been recorded as owing to the subject trust by Mexibrook Pty Ltd. The actual payments made by the subject trust for the benefit of the TFC Trust from 2006 to the end of 2013 were six in number, totalling \$69,234. Again, this indicates that the amount recorded as owing by this entity to the subject trust as at 2013, was for the most part not the result of payments made by the trust during the time in which Timothy Chee was the sole director of the corporate trustee. Therefore again, a claim of the second kind against this party would be problematical, and in this case, relatively small.
- [47] Mexibrook Pty Ltd is the trustee of the so-called MHP Unit Trust. The company was incorporated in 2001. Its current directors are Timothy Chee, his wife Faye Chee and another person who appears to be relevantly independent who is also shown as the owner of one of its two shares. According to the document exhibited to an affidavit of Mr Skinner, the solicitor for Timothy Chee, nearly half of the issued units are held by the TFC Trust.
- [48] Claims of the second kind against these borrowers would involve a very substantial factual inquiry. In the case of Acebeck and the TFC Trust, it is far from clear that the loan balances as at 31 December 2013 were, at least for the most part, the result of payments made from the subject trust assets during the time of Timothy Chee's control of the corporate trustee. But those doubts are not so critical for the loan repayment claims.

²⁸ Court document 13.

For those claims, the trustees start with the advantage of the records of the trust, maintained under the supervision of Timothy Chee, showing certain amounts owing as loans by these entities. The suggested alternative characterisation of these balances (as advances or payments to Timothy Chee) should not deter the trustees from litigating the loan repayment claims.

- [49] I should note a further submission which was made for Timothy Chee, which is that the loan repayment claims might be defeated by set-offs. To explain that, another part of the trustees' proposed litigation was to challenge certain real property mortgages which were assigned to Timothy Chee and which he says secure a debt owing by the trust in an amount of \$2.35 million. The draft financial statements as at 30 June 2013 record such a debt. The trustees sought advice here as to whether they should sue Timothy Chee to the end of having these mortgages removed, upon the basis that in truth he is owed nothing which is secured by them. At one point in the submissions for Timothy Chee, it was suggested that this debt of \$2.35 million could be used as a set-off against the trustees' claims. When it was pointed out that the loan repayment claims would be made not against Timothy Chee but against the debtors named in the accounts of the trust, it was suggested that in some way the debt of \$2.35 million could be assigned in various parts to those entities. Some things may be said about that suggestion. The first is that there has been no such purported assignment and it was raised only as a possibility. The second is that a debt cannot be assigned at law in part.²⁹ The third is that the trustees' claims, in total, well exceed the sum of 2.35 million.
- [50] In my conclusion, the trustees should be advised that proceedings can and ought to be brought against Acebeck Pty Ltd, THLC Pty Ltd and Mexibrook Pty Ltd for repayment of moneys owing by them to the subject trust, according to the accounts of the subject trust. The trustees should be directed to seek the further advice of the court on those proceedings after the completion of disclosure if the proceedings are not determined earlier.
- [51] The trustees will not be advised to bring proceedings to make other claims against those parties in relation to those debts.

Documents

- [52] By para 2 of the originating application, the trustees sought directions as to the distribution of the Report and counsel's opinion. By para 3, they sought a direction that they not be required to produce to Timothy Chee "documents which the applicants regard as transactional or source documents of the Trust".
- [53] On 1 December last, it was ordered by consent that the Report be provided to the solicitor for Timothy Chee, on the basis that it could be disclosed only to his counsel and accounting professional advisors "who have a bona fide need to know all or some of the contents of the Report" as long as they also undertook to keep it confidential and not to disclose it to Timothy Chee.
- [54] On the second day of the hearing, counsel for Timothy Chee told me without objection that Lois Lau and Elizabeth Sun Ling White "have had the [Report]" and "they've had the advantage of Mr Amerena's opinion". It is unclear whether those documents have

²⁹ *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9, 29.

also been provided to Valerie Kay Ling Chee. In the outline of the trustees' argument of 3 March 2015, the trustees did not press for any relief under para 2 of the originating application. But they did press for an order in terms of para 3.

- [55] Last September, Timothy Chee wrote some five letters requesting information and documents from the trustees. One letter related to the retainer of Mr Benjamin to undertake accounting work on behalf of the trust. A second requested information and documentation about Mr Benjamin's appointment as a trustee. A third inquired as to the retainer of Broadley Rees Hogan as the solicitors for the trustees. A fourth inquired as to the appointment of Mr and Mrs White as directors of the corporate trustee. The fifth inquired as to the state of preparation of the accounts of the subject trust for the 2013/2014 year. In particular, it asked for draft accounts if they existed.
- [56] On 19 September 2014, the trustees responded through Broadley Rees Hogan. Some documents and information were provided although not everything which Timothy Chee had requested. He was advised that the 2013/2014 accounts had not been completed because of ongoing investigations as to the affairs of the trust.
- [57] After exhibiting this correspondence to his affidavit, Mr Broadley said:

“17. In summary, the present Trustees have to date provided Tim Chee with relevant constitutional documents and summary documents but have declined to provide documents of a transactional or source nature.”

I have to say that the correspondence does not plainly indicate an issue between the trustees and Timothy Chee which could be defined by the description “documents of a transactional or source nature”. Nor did Timothy Chee seek an order for the production of such documents at the hearing. His written submissions, like those for the trustees, addressed extensively the authorities on the question of a beneficiary's entitlement to information and documents held by a trustee. But in the written submissions for Timothy Chee dated 1 December 2014 (apparently written before the agreement which resulted in the consent orders of that date) the only document sought for Timothy Chee was the Report. No document was sought by the ultimate submissions for Timothy Chee.

- [58] I am not persuaded to make an order in terms of para 3 of the originating application in circumstances where Timothy Chee does not seek the production of further documents of that kind, at least within this application, and where last year's correspondence does not demonstrate that there was an issue as to a category of documents described as transactional or source documents.

Conclusions

- [59] The trustees will be advised in terms of para 50 of these reasons. The originating application will be otherwise dismissed. The copies of the Report and counsel's opinion and the draft statement of claim will be placed within sealed envelopes and marked “Not to be opened without the leave of the court or a judge”.